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No. 89-1788

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1989

Claude Fletcher,

Petitioner,

vs.

San Jose Mercury News,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeal correctly conclude that the evidence in this case was insufficient to show with convincing clarity that respondent newspaper acted with actual knowledge of falsity or a high degree of awareness of probable falsity?[1]

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[1] Respondent San Jose Mercury News is a wholly owned subsidiary of Knight-Ridder Publishing, Inc.

TABLE OF AUTHORITIES

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Cases

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STATEMENT OF THE CASE

Petitioner's statement of the case contains many assertions contrary to, or not supported by, the record. The pertinent facts are analyzed in detail in the opinion of the California Court of Appeal. In the proceedings below, petitioner conceded that

the statement of facts in that opinion was "largely correct" (Petition for Review by California Supreme Court, p. 3). In his petition to this Court, however, petitioner has identified for the first time "several" supposed factual errors in that opinion (see Pet., pp. 13-18). These newly raised claims are without merit. We limit our discussion to some of the more important facts and to a refutation of petitioner's misstatements of the facts:

In January 1984, Phil Trounstine, an editorial writer for respondent San Jose Mercury News (hereinafter sometimes the "News") received a tip from two confidential sources that there had been an investigation by the local District Attorney into an alleged bribe attempt involving petitioner and Tommy Fulcher, the executive director of Economic and Social Opportunities, Inc. ("ESO"), a local anti-poverty agency (RT,

pp. 1189, 1206). At that time, petitioner was a city councilman and a member of the board of directors of ESO (RT, pp. 947, 1185-1186). It was reported to Trounstine that petitioner had attempted to obtain an ESO contract for a company called Weathermaster, and that petitioner allegedly had a financial interest in Weathermaster prior to his March 9, 1983 resignation from the ESO board (RT, pp. 1184-1186, 2078-2080).[2]

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[2] Petitioner erroneously asserts that the News had received this information six months earlier but delayed investigation until petitioner stood for election for Mayor (see Pet., pp. 6, 25, 27). In fact, Mr. Trounstine had previously received a different report of an alleged conflict of interest involving petitioner and Weathermaster, but had been unable to corroborate it (RT, pp. 1188, 1204-1206). The District Attorney's investigation followed and prompted the News' investigation and story in issue here.

With respect to the first report to Trounstine, petitioner asserts that the Court of Appeal erred in noting that one of the alleged sources of information declined to speak to Trounstine (Pet., p. 13). In fact, the opinion below correctly states the record (see RT 7, p. 1212), and the

Trounstine turned this information over to News' reporter Scott Herhold for investigation (RT, pp. 1189-1190, 1206-1208, 1932). Herhold immediately commenced an investigation. He telephoned ESO executive director Fulcher, who told Herhold that a proposal for ESO to sponsor a project to weatherize the homes of low-income persons had first come before the ESO board in January 1983 (RT, pp. 1538-1550, 1971). At that meeting, petitioner volunteered to investigate the possibility of having outside contractors perform the work for ESO (RT, pp. 1091, 1511-1512, 1543-1544). Thereafter, on several occasions, petitioner urged that Weathermaster be awarded the contract (RT 6, pp. 1542, 1971-1972).[3]

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same statement is also found in petitioner's opening brief in the Court of Appeal (at p. 10, lines 12-15).

[3] Ultimately, as the Court of Appeal noted (Appx. to Pet., p. 8a), the bulk of the ESO contract was awarded to a different

Fulcher reported that, in a conversation in February 1983, petitioner had asked whether Fulcher and his wife would like a trip to Hawaii, a comment Fulcher interpreted as an offer of a bribe (RT 6, pp. 1521-1522, 1541, 1547, 1974-1976). In another conversation, petitioner had told Fulcher "there is something in this for you" (RT, pp. 1523, 1545, 1974-1976), a comment Fulcher also interpreted as an offer of a bribe (RT, pp. 1544-1545, 1687-1688, 1695-1696). Fulcher also told Herhold that, at another time in February 1983, petitioner had told him that petitioner was "out on a limb" because he had invested $40,000 in Weathermaster (RT 6, pp. 1546, 1643, 1975).

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company. Petitioner erroneously asserts that the Court of Appeal was "plainly wrong" in stating that Weathermaster received a small portion of the work (Pet., p. 13). In fact, the Court of Appeal was correct (RT, p. 625).

Fulcher told Herhold that he had been shocked and outraged by petitioner's actions, and that he eventually reported those apparent attempts at bribery and the possible conflict of interest to the District Attorney (RT 6, pp. 1549, 1992).

During February and early March 1984, reporter Herhold corroborated Fulcher's story by contacting various members of the ESO board of directors (RT, pp. 933-934, 937-939, 942, 1698-1699, 1701-1702, 1814-1819, 1982-1986, 1991, 2076-2079). All of the ESO board members to whom Herhold spoke told him that petitioner had urged that the contract be awarded to Weathermaster (ibid.).[4]

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[4] Petitioner erroneously asserts that the News falsely reported the ESO board members' comments and, in particular, that the ESO board members assertedly denied that they had said that petitioner had "lobbied" them on behalf of Weathermaster (see Pet., pp. 14-15). In fact, at trial, all but one of the board members interviewed by Herhold acknowledged that they told him that they had been "lobbied" by petitioner on Weathermaster's behalf (RT,

Having obtained ESO director Fulcher's story and the corroborating information from the ESO board members, reporter Herhold conducted further investigation of background information. In the course of that investigation, he interviewed other witnesses who reported that petitioner had ties to Weathermaster prior to his resignation from the ESO board (RT, pp. 1722-1725, 1728-1734, 1771-1772, 1872-1873, 2006, 2017-2019, 2033-2034, 2060-2061, 2063, 2065-2066).[5]

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pp. 1699, 1817, 2079, 2339, 2344). The other board member denied use of the word "lobby," but acknowledged that petitioner had recommended Weathermaster to her (RT, p. 934).

[5] Petitioner makes a great deal of the fact that, at trial, certain (but not all) of those individuals denied that they had made statements attributed to them (see Pet., pp. 8-11, 23, 27). However, petitioner ignores several critical facts. First, the main thrust of the news articles (about petitioner's alleged conflict of interest and the apparent bribe attempts) was received from ESO executive director Fulcher and ESO board members who affirmed

Before publishing the articles, the News contacted petitioner. In a tape recorded interview, petitioner stated that he obtained a financial interest in Weathermaster after his resignation from the ESO board (Tape Transcript ("Tr."), pp. 6, 23). Petitioner denied that he had offered Mr. Fulcher a trip to Hawaii or said "there is something in this for you" (Tr., pp. 49-52).[6] He further denied that he had recommended Weathermaster to the ESO board

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at trial that they were accurately quoted by the News. Second, the witnesses mentioned by petitioner provided only peripheral background information. Third, although some of those witnesses denied certain specific details, they confirmed that they had in fact given reporter Herhold information that tied plaintiff to Weathermaster prior to his resignation from the ESO board (RT 433, 439-441, 461, 838-841, 861-863, 2250). Fourth, two of those witnesses admitted at trial that they had previously acknowledged the accuracy of the News' reports (RT 456-457, 2258-2268).

[6] At trial, petitioner admitted that he had made the comments in question, but he argued that they had been misinterpreted (see RT, pp. 996-997, 1104).

(Tr., pp. 25-26, 50).[7] While asserting that the proposed Weathermaster contract with ESO was not a factor in his ultimate investment in Weathermaster, he admitted:

> "I saw a chance to move into that field and I took that opportunity, yes, and granted, it did come about because of that investigation on behalf of the public agency, sure it did * * *" (Tr., p. 84; Appx. to Pet., p. 18a).

After the interview, petitioner urged Mr. Fulcher to tell the News that petitioner's comments to Fulcher about a trip to Hawaii and "something in this for you" (which petitioner had flatly denied making at all in his interview with the News) could have been interpreted in different ways (RT, pp. 1111, 1551-1552). Mr. Fulcher did so, but at the

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[7] At trial, petitioner admitted that he had in fact recommended Weathermaster to ESO board members in early February 1983 (RT 4, pp. 904-905, 1115-1120).

same time he affirmed that he had interpreted petitioner's approach to him as a bribe offer because "there was no other way I could interpret it" (RT, pp. 1552-1553, 1592-1593, 1916-1917, 1926-1928).

The articles in issue (see Pet., pp. 22A-36A) followed.

ARGUMENT

I. THE PETITION PRESENTS NO IMPORTANT ISSUE FOR REVIEW.

A. This Court Has Clearly Held That the Constitutional Actual Malice Standard Applies in Libel Actions Brought by Public Figures.

The sole legal issue offered for review by the petition is:

"Whether highly unreasonable conduct constituting an extreme departure from ordinary standards of investigation and reporting is alone enough to establish the malice necessary to assess liability in a public-figure libel case" (Pet., p. i).

In posing this issue, petitioner ignores this Court's recent opinion in Harte-Hanks Communication Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678 (1989). As that decision notes, it had once been suggested that the test proposed by petitioner be applicable in public figure cases. However, that proposed test "was emphatically rejected by a majority of the Court" (109 S.Ct. 2685). As this Court concluded,

"Today, there is no question that public figure libel cases are controlled by the New York Times standard and not by the professional standards rule

which never commanded a majority of this Court" (ibid.).

Accordingly, whether petitioner is deemed a public official or a public figure, the constitutional actual malice test unquestionably applies.

B. The Other Issues Presented by the Petition Are Based Upon Petitioner's Misstatements of the Facts.

The petition also presents two other purported "issues" for review (see Pet., p. i, issues (2) and (3)), both of which fact-bound issues are dependent upon petitioner's erroneous statements of the evidence. For example, petitioner makes repeated references to supposed evidence of fabrications by the reporter, and he argues that a finding of constitutional actual malice could be based upon such evidence

(Pet., pp. 8-11, 13, 14-16, 20, 26). However, as discussed above (p. 6, n. 4; p. 7, n. 5), there is no substantial evidence, let alone clear and convincing evidence, of fabrication. Petitioner fails to disclose that the witnesses upon whom he relies either admitted that the reporter had correctly reported the substance of their comments (as opposed to the precise words spoken) or that those witnesses were so substantially impeached that their testimony could not possibly have constituted clear and convincing evidence of anything.

Thus, the contrast between the facts in this Court's decision in Harte-Hanks and the exhaustive, two-month investigation in the instant case is striking. The primary source for the news stories here, ESO executive director Tommy Fulcher, was a reliable source who told a plausible story which, to the extent it could be checked, had been

corroborated by every source inside ESO contacted by the newspaper.[8] Moreover, rather than relying solely on Fulcher's information and that of other ESO personnel, the newspaper continued to investigate every possible source of information about petitioner's dealings with ESO. Several of those sources provided corroborating information, and none of them provided contrary information. Unlike Harte-Hanks, there is no evidence of a deliberate choice to avoid the truth.[9]

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[8] In arguments not raised below, petitioner attempts to impeach the credibility of ESO executive director Fulcher (see Pet., pp. 15, 26). None of the matter belatedly raised by petitioner bears on Fulcher's credibility in general or with respect to the reports in issue here.

[9] In a strained attempt to draw an analogy to Harte-Hanks, petitioner asserts that the News "decided not to listen" to a tape recording of a special ESO board meeting in February 1983 (Pet., pp. 23-24, 26). In fact, at the time of the investigation, the reporter was unaware that the special meeting had occurred (RT, pp. 2218-2219). Moreover, nothing in the tape in

C. Petitioner's Claims of Errors of State Law Are Without Merit.

Petitioner complains that the California Court of Appeal did not correctly state California law governing grants of judgments notwithstanding the verdict (see Pet., pp. 19-20). Even if that were true, it would hardly present a question of concern to this Court. Moreover, the very statements by the trial court and by the Court of Appeal quoted in the petition (at pp. 19-20) show that those courts were fully aware of the respective roles of judge and jury. Consistent with its obligation under federal constitutional law, the Court of Appeal correctly reviewed all the evidence on the issue of constitutional actual malice, and it

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issue would have revealed any errors in the News' story. Indeed, on that tape, two board members state that petitioner had urged them to award the contract to Weathermaster (RT, pp. 1114-1115).

correctly concluded that there was no clear and convincing evidence that the News was aware that its reports were actually or probably false (see also discussion, infra, pp. 17-19).

Petitioner also complains of purported "unusual" actions by the trial court (see Pet., pp. 12-13). These belated claims of trial court error do not involve any question of federal law and certainly no question worthy of this Court's attention. Moreover, none of those actions were even questioned as error before either the California Court of Appeal or the California Supreme Court.

II. THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT, INCLUDING ITS RECENT DECISION IN HARTE-HANKS COMMUNICATIONS INC. v. CONNAUGHTON.

Petitioner argues that the decision below departs from this Court's rulings in that the evidence, assertedly, would support a finding of constitutional actual malice. Petitioner is wrong.

Petitioner places great reliance on his demand for retraction, asserting that "this alone is sufficient to present a jury question on the issue of constitutional malice" (Pet., p. 20). Precisely the same argument was emphatically rejected by this Court in Harte-Hanks (___ U.S. ___, 109 S.Ct. 2698, n. 37).

Petitioners' remaining arguments (see Pet., pp. 22-25) are based upon his numerous erroneous statements of the record. Each of those arguments was reviewed and correctly rejected by the Court of Appeal (see App. to Pet., pp. 14a-17a). Contrary to petitioner's assertion (Pet., p. 18), the Court of Appeal recognized its obligation to review all the evidence of actual malice (Appx. to Pet., p. 14a), and its exhaustive review of the facts demonstrates that it did so (see id., pp. 7a-11a).

There is no need to repeat that review here. Suffice it to say that the uncontradicted evidence shows that the articles were based upon reports from a reliable source and that those reports were corroborated by several independent witnesses. There is no evidence, and certainly no clear and convincing evidence, that either the newspaper or its reporter was aware of

any errors in the articles or that they doubted the articles' accuracy. The courts below were therefore correct in determining that judgment should be entered on behalf of the defendant newspaper.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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